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No. 82-976

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROSCOE HOWARD, JR.,

Respondent.

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR REHEARING UPON DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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ARGUMENT

RESPONDENT'S IRRELEVANT OPPOSITION COMPLETELY IGNORES THE ARGUMENTS ADVANCED IN THE PETITION FOR REHEARING

In the petition for rehearing filed in this matter, it was argued that respondent's first degree murder conviction should be

upheld pursuant to California v. Beheler (1983) ____U.S._____, 103 S.Ct. 3517, 77 L.Ed.2d 1275 and that a reversal of respondent's conviction could further result in reducing the punishment of respondent's accomplice, Jerry Beheler. Respondent's opposition totally ignores these arguments and instead submits that it would now be unfair to uphold his murder conviction since his accomplices, Willbanks and Beheler, were only punished for voluntary manslaughter. 1/ Respondent's claim is completely irrelevant

1/ To the extent that this contention might be based on "collateral estoppel", it has already been rejected by this Court in California v. Beheler, supra, 103 S.Ct. at 3520 fn. 3, 77 L.Ed.2d at 1280 fn. 3. Moreover, given the appropriate opportunity, petitioner submits that California courts would also reject such an argument. (See, e.g. People v. Mata (1978) 85 Cal.App.3d 233, 237; People v. Hernandez (1971) 18 Cal.App. 3d 651, 657; People v. Collins (1966) 242 Cal.App.2d 626, 634; People v. Massie (1953) 122 Cal.App.2d 235, 236; see also People v. Taylor (1974) 12 Cal.3d 686, 697 fn. 13.) Respondent completely misconstrues the California Supreme Court's opinion in Carlos v. Superior Court (1983) 35 Cal.3d 131, if he means to imply that a "collateral estoppel-type" doctrine would apply in his case.

and misleading. 2/

The issue in this case is not whether respondent should be punished for murder or

2/ Despite the patent irrelevancy of respondent's opposition, petitioner wants to set the record straight concerning the recent disposition of the Beheler case and its possible impact on respondent's ultimate sentence. Contrary to respondent's insinuation, Beheler's first degree murder conviction was not reduced to voluntary manslaughter simply because the triggerman Willbanks was only convicted of the lesser homicide. Rather, the Fifth District Court of Appeals reviewed the "totality of the circumstances" pursuant to the proportionality analysis enunciated by the California Supreme Court in People v. Dillon (1983) 34 Cal.3d 441. The court reduced Beheler's conviction to voluntary manslaughter. Upon remand, Beheler was resentenced to the "middle term" of four years, as opposed to the "upper term" of six years, and was promptly released. However, in direct contrast to respondent's argument, the reviewing court intimated that respondent could very well receive a higher sentence (second degree murder) since "it could be argued that Howard was more culpable than Beheler because Howard provided the murder weapon and was not as inebriated as Beheler." (People v. Beheler, infra, 153 Cal.App. at 259, 200 Cal.Rptr. at 1205.) Furthermore, even if respondent's conviction was modified to voluntary manslaughter, he might very well receive an "upper term" rather than a "middle term". Finally, no showing has been made that respondent would receive the same credits on his sentence as Beheler. Thus, there is no basis for concluding that respondent has already served his entire sentence. No determination of that can be made unless this Court grants the petition for rehearing and upholds respondent's conviction.

manslaughter. That is a determination for the California courts. (People v. Dillon (1983) 34 Cal.3d 441; People v. Laboa (1984) 158 Cal. App.3d 115; see also People v. Beheler (1984) 153 Cal.App.3d 242, 200 Cal.Rptr. 195 (ordered depublished on May 17, 1984). 3/

The question before this Court is whether respondent will stand convicted of any crime at all. As it stands now, his conviction for murdering Peggy Dean has been completely reversed and a crucial piece of prosecution evidence, respondent's confession, has been suppressed.

Respondent's opposition makes no effort to counter petitioner's argument that his confession should be admitted and his conviction upheld pursuant to California v. Beheler, supra. Nor does he rebut the fact that Jerry Beheler has tried to take advantage of this Court's initial order denying certiorari to seek a further reduction of his already anematized

3/ Generally, unpublished opinions cannot be cited as authority in California. (Cal. Rules of Court, rule 977.)

sentence. Although Beheler is now a "free" man, it cannot be said that he will not rely on the vagaries of California law to attempt to reduce or remove the various disabilities and penalties that are attached to his status as a felon convicted of voluntary manslaughter. (See, e.g. Cal.Pen. Code §§ 667 et seq., 1192.7(c), 1385, 4800 et seq.)

Petitioner agrees with respondent on one point -- he should be treated the same as Jerry Beheler. It is undisputed that both respondent and Beheler agreed to be interviewed and subsequently confessed to murdering Peggy Dean during a police contact in which no "indicia of arrest" were present. Just as this Court ruled that Beheler's confession should be admitted as evidence, it should now so rule in respondent's case. Just as Beheler's murder conviction was upheld, so should be respondent's. Uniformity of

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decision and the interests of justice require that the petition for rehearing be granted.

Respectfully submitted,

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